

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHILLIP M. SMITH, DECEASED

Claimant

VS.

WINFIELD LIVESTOCK AUCTION, INC.

Respondent

AND

MEADOWBROOK INSURANCE CO.

Insurance Carrier

Docket No. 1,001,627

ORDER

The decedent's surviving spouse, Bonnie Smith, requested review of the September 30, 2003 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on March 9, 2004.

APPEARANCES

D. Shane Bangerter of Dodge City, Kansas, appeared for the decedent's surviving spouse. Stephen J. Jones of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This is a claim for death benefits brought by the surviving spouse of Phillip M. Smith. Mr. Smith died on October 7, 2001, after being hospitalized for injuries suffered while attempting to load a cow into a trailer on October 3, 2001.

The Administrative Law Judge (ALJ) determined that at the time of the accident the decedent was not working for respondent and, instead, the primary purpose of his activity was personal as he was loading the cow to haul it home for his neighbor. Consequently, the ALJ denied compensation finding the decedent's accident did not arise out of and in the course of his employment.

The surviving spouse requests review of the following: (1) whether the decedent's accidental injury arose out of and in the course of employment with the respondent; and (2) whether decedent's death on October 7, 2001, was related to his personal injury by accident on October 3, 2001. The surviving spouse argues that, although decedent had clocked out from his job, he was on respondent's premises and he was performing a task for the benefit of respondent when the accident occurred.

Respondent argues the decedent had been clocked out from his job with respondent for a couple of hours and that he was performing a personal errand by loading a neighbor's cow to return it to his neighbor when the accident occurred. Consequently, respondent requests the Board to affirm the ALJ's Award.

In the alternative, respondent further argues that the surviving spouse has failed to sustain her burden of proof that the decedent's pulmonary embolism was related to the accidental injury. Respondent objected to the foundation for the medical opinion that the cause of death was related to the accident because the doctor's opinion was not based upon a complete review of decedent's medical and treatment records and the doctor did not provide an opinion based upon a reasonable degree of medical probability but instead opined the death was "expected" to be related to the trauma.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The decedent, Phillip M. Smith, was employed by respondent for approximately five years. The decedent was a farmer but he worked for respondent one day a week on the day livestock auctions were held. Decedent worked the scales where the livestock would be weighed. He then would push the livestock off the scales into the auction pen.

On October 3, 2001, decedent clocked in at 10:53 a.m. and the sale started at 11 a.m. The decedent worked the scales until the livestock sales were concluded and then he clocked out at 3:21 p.m. The decedent then went to the café located on the premises and had something to eat or drink while he socialized with other sale patrons.

On October 3, 2001, decedent had hauled three cows to the sale for a neighbor. Decedent had an arrangement with respondent that he used his truck and respondent's

trailer to occasionally haul livestock to the sale. Decedent would determine the rate for hauling the livestock and respondent would receive 20 percent of that fee for the use of respondent's trailer. However, on October 3, 2001, decedent did not charge a fee for hauling his neighbor's cattle to the sale.

One of the three cows decedent had hauled to the sale on October 3, 2001, was not sold. At approximately 5 p.m., the decedent drove his truck and the trailer to the area where the livestock were to be loaded onto trucks and trailers. Instead of backing up to a loading dock, the decedent drove to another area where the cattle are directed down an alleyway into the livestock trailer. The trailer door was opened and two of respondent's employees responsible for loading livestock were sent to move the cow from a holding pen into the alleyway leading into the trailer. As J.D. Petersen went to get the cow, his co-worker, Sarah Conway closed a small gate on one side of the trailer which attached to the trailer and formed a chute into the trailer. The decedent was on the other side of the trailer but instead of closing the small gate on his side, he simply stood in that space to direct the cow into the trailer.

Mr. Petersen had suggested that decedent back the trailer up to a loading dock but decedent had replied that it was his cow, that she would walk right into the trailer and that she wouldn't run over him.¹ Mr. Petersen went and got the cow out of a holding pen and drove her toward the trailer. When the cow got to the trailer she circled a couple of times and then lowered her head and forced her way between decedent and the trailer. Both the cow and decedent were momentarily wedged between the fence and trailer. The cow then backed up and hit decedent again causing him to fall underneath the trailer as the cow ran over him and escaped.

Decedent was taken by ambulance to the Winfield Hospital emergency room and then flown to Wesley Medical Center in Wichita, Kansas. The decedent suffered multiple fractured ribs and during his hospitalization developed a pulmonary embolism and unfortunately died on October 7, 2001. The death certificate listed the cause of death as respiratory failure and pulmonary embolism due to a closed chest injury.²

The Workers Compensation Act places the burden of proof upon claimant to establish her right to an award of compensation and to prove the conditions on which that

¹ Decedent's neighbor was charged veterinarian fees for two cows but not the third cow although it was noted the veterinarian conducted pregnancy checks on all three cows the decedent brought to the auction. J.D. Petersen was told by decedent that the cow being loaded after the sale was decedent's cow. The parties concluded all three cows belonged to the decedent's neighbor but the evidence raises a question whether the cow that was not sold was owned by decedent.

² R.H. Trans., Cl. Ex. 2.

right depends.³ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁴

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

In *Kindel*, the Supreme Court stated the general principles for determining whether a worker's injury arose out of and in the course of employment:

The two phrases arising 'out of' and 'in the course of' employment, as used in our Workers Compensation Act, K.S.A. 44-501 *et seq.*, have separate and distinct meanings; they are conjunctive, and each condition must exist before compensation is allowable. The phrase 'out of' employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises 'out of' employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.⁷

In this instance, it is uncontradicted that decedent had concluded his regular job duties for respondent. The decedent had clocked out and had gone to the café for refreshments and to socialize with others who had attended the sale. Approximately two hours later, the decedent then drove to the loading area to retrieve one of the cows he had brought to the sale that day.

It is further uncontradicted that decedent was on the employer's premises at the time of the accident. However, respondent argues that decedent's activities while on the

³ K.S.A. 44-501(a) (Furse 2000); *see also Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

⁴ K.S.A. 2001 Supp. 44-508(g). *See also In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ *Brobst v. Brighton Place North*, 24 Kan. App.2d 766, 771, 955 P.2d 1315 (1997).

⁶ *Springston v. IML Freight, Inc.*, 10 Kan. App.2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

⁷ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

premises was a deviation from his normal work activities and of a personal nature or personal errand. Therefore, the premises exception to the “going and coming” rule would not apply.⁸

The respondent’s employees, Mr. Petersen and Ms. Conway, noted that it was their responsibility to load and unload the livestock brought to the livestock auction. They noted that the individual hauling the livestock would simply back up to the loading area and stand and watch the livestock be unloaded or loaded and occasionally participate by swinging the gate on their trailer shut. Ms. Conway noted that decedent typically stood and watched as the cattle he was hauling were loaded. On the date of the accident the decedent was standing by the trailer while respondent’s employees were retrieving and loading the cow.

In this instance, while decedent’s primary purpose for loading the cow was personal, the surviving spouse argues that decedent was also involved in the dual purpose of assisting respondent’s other employees with loading the cow. The surviving spouse argues decedent’s actions in that regard would benefit the respondent by assisting the other employees efforts to load the cow. Accidental injuries which occur on dual purpose excursions where the benefit is both to the employer and the employee are generally ruled compensable.⁹ However, the dual purpose rule does not extend to factual situations where the errand would not have been undertaken if the personal errand had been abandoned or postponed.¹⁰ In this case the decedent would not have been back in the loading area but for his personal errand to haul the cow back to his neighbor. Mr. Petersen and Ms. Conway noted that decedent did not otherwise assist in loading livestock after the sale concluded.

The decedent’s accidental injury occurred after he had departed from the work for which he was employed.¹¹ Furthermore, the decedent’s primary purpose for being in the loading area was personal as he was retrieving a cow to haul it home for a neighbor. Accordingly, decedent’s accidental injury occurred after he had departed from the work for which he was employed and while he was primarily engaged in a personal errand. Moreover, if decedent did not have the personal reason to go to the loading area of respondent’s facility he would not have been there. The Board finds the accident did not occur in the course of decedent’s employment nor arise out of his employment. The ALJ’s Award should therefore be affirmed.

⁸ *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994). But see *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, 59 P.3d 352 (2002).

⁹ 1 Larson’s Workers’ Compensation Law § 16 (2003).

¹⁰ *Tompkins v. Rinner Construction Co.*, 194 Kan. 278, 398 P.2d 578 (1965).

¹¹ *Bailey v. Mosby Hotel Co.*, 160 Kan. 258, 267, 160 P.2d 701 (1945).

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated September 30, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: D. Shane Bangerter, Attorney for Claimant
Stephen J. Jones, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director